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IN THE

# Supreme Court of the United States

BARBARA GRUTTER,

*Petitioner,*

-and-

JENNIFER GRATZ AND PATRICK HAMACHER,

*Petitioners,*

v.

LEE BOLLINGER, *et al.*,

*Respondents.*

**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF *AMICUS CURIAE* OF AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF THE AFL-CIO | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 2 |
| Introduction | 2 |
| I. THE COMPELLING INTEREST IN REDUCING EMPLOYMENT DISCRIMINATION | 5 |
| A. The Persistence of Employment Discrimination | 5 |
| B. The Resistance of Discrimination Rooted in Prejudice and Stereotypes to Prohibition | 15 |
| II. THE ADMISSIONS PROGRAMS FURTHER THE COMPELLING INTEREST IN REDUCING DISCRIMINATION | 17 |
| A. Segregation in the U.S. Prior to College | 17 |
| B. The Conditions for Contact on Campus | 19 |
| C. The Benefits of Contact With Diverse Peers in Higher Education | 19 |
| 1. Reduction of Stereotypes and Bias | 19 |
| 2. Benefits in the Workplace | 24 |
| III. THE ADMISSIONS PROGRAMS ARE NARROWLY TAILORED | 28 |
| A. There Are No Race-Neutral Alternatives | 29 |
| CONCLUSION | 30 |

## TABLE OF AUTHORITIES


CASES — Page

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ..... 6, 28
*Ambach v. Norwick*, 441 U.S. 68 (1979) ..... 3
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*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) ..... 4, 30
*Freeman v. Pitts*. 503 U.S. 467 (1992) ..... 17, 18
*Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) ..... 23
*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) ..... 4, 5
*United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) ..... 6, 16
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STATUTES AND LEGISLATIVE MATERIALS

42 U.S.C. §§ 2000e-2000e-16 ..... 5
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Page

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CROSS, HARRY, GENEVIEVE KENNEY, JANE MELL, & WENDY ZIMMERMAN, EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS (1990) ..... 10



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Page

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DeFreitas, *Ethnic Differentials in Unemployment among Hispanic Americans*, in HISPANICS IN THE U.S. ECONOMY 127 (Borjas & Tienda, eds. 1985) ..... 8

Donohue & Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) ..... 6, 15

FEDERAL GLASS CEILING COMMISSION, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL – RECOMMENDATIONS OF THE FEDERAL GLASS CEILING COMMISSION (1995) ..... 5, 6

FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL—FACT-FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION (1995) ..... 6, 8, 15-16

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Page

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Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187 (Orfield, ed. 2001) ..... 22

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Keith & Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. OF SOC. 760 (1991) ..... 9, 10

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TABLE OF AUTHORITIES—Continued

Page

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| Wilson, Woodrow, *Princeton for the Nation's Service*, in 1 THE PUBLIC PAPERS OF WOODROW WILSON: COLLEGE AND STATE 450 (Baker & Dodd, eds. 1925) | 3 |
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## INTEREST OF THE AFL-CIO

The American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) is the largest organization of working men and women in the United States, consisting of 65 national and international unions representing over 13 million members.[1] Many of these members teach, work, and study on the campuses of public universities and colleges. The American Federation of Teachers (AFT), for example, represents approximately 125,000 faculty and staff members at universities and colleges and over one million teachers and others in public schools.

Moreover, while unions have not been immune from the virus of discrimination, for the past half century unions have been at the forefront of efforts to end employment discrimination. Again, to cite just one example, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) created a Fair Practices and Anti-Discrimination Department in 1946 and for over 40 years has secured anti-discrimination provisions in its contracts with the big three domestic automakers. The UAW, headquartered in Michigan, filed a brief in support of the University in the Court of Appeals.

Most fundamentally, virtually every graduate of the University of Michigan and its Law School, as well as graduates of comparable institutions of higher education, will leave academia and enter the workplace as an owner, manager, supervisor, union officer, union member, and/or employee. In the workplace, these graduates will be expected

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[1] Pursuant to Rule 37.3(a), the parties have lodged letters with the Court consenting to the filing of briefs *amicus curiae* in both *Grutter v. Bollinger*, No. 02-241, and *Gratz v. Bollinger*, No. 02-516. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission.

to honor a set of fundamental public policies, including the command that they not discriminate on the basis of race or national origin. The experience of the AFL-CIO teaches that the unique opportunities to interact with people from other races and ethnic groups on a university campus—at the threshold of the workplace—that are fostered by the admissions policies at issue in this case, will have substantial, positive impact on students, making them better citizens in our democracy as well as more productive members of society. Specifically, the challenged policies will reduce employment discrimination.

## SUMMARY OF ARGUMENT

There is a compelling governmental interest in eliminating employment discrimination. While such discrimination is unlawful, a vast body of evidence reveals its persistence, its resistance to prohibition, and its pernicious effects.

Among the most clearly documented educational benefits of the diverse student body created by the challenged admissions policies is the reduction of stereotypes and prejudices that lead to discrimination.

Multiple, long-term, national studies of both primary and secondary as well as higher education document a link between interaction with students of diverse races and ethnic backgrounds and a reduced resistance to working with such people after graduation. These studies demonstrate that White, African-American and Hispanic students schooled with diverse peers are more likely to work in integrated workplaces. Thus, the challenged admissions policies further the compelling governmental interest in equal employment opportunity.

## ARGUMENT

### *Introduction*

In 1902, Woodrow Wilson, then President of Princeton University, eloquently stated:



> The college should seek to make the men whom it receives something more than excellent servants of a trade or skilled practioners of a profession. It should give them elasticity of faculty and breadth of vision, so that they shall have a surplus of mind to expend, not upon their profession only, for its liberalization and enlargement, but also upon the broader interests which lie about them, in the spheres in which they are to be, not breadwinners merely, but citizens as well, and in their own hearts, where they are to grow to the stature of real nobility. [Woodrow Wilson, *Princeton for the Nation's Service*, in 1 THE PUBLIC PAPERS OF WOODROW WILSON: COLLEGE AND STATE 450 (Baker & Dodd, eds. 1925).]

The words of President Wilson are even more true of a great public university like the University of Michigan. In linking education and citizenship, his words suggest that we begin by inquiring into the function of public universities in a democracy. Public universities do not exist solely to convey benefits on individuals, advantaging them in the competitive market. Public universities exist because, as a nation, we believe in the value of education—not only that education makes people more productive as economic actors, but, more fundamentally, that education makes people better citizens of our democracy. In contrast to schools in closed societies elsewhere in the world that teach intolerance and hatred, our public universities are dedicated to instilling the principles of critical inquiry, openness, and respect for all people.

This Court has repeatedly recognized the role of public education in a democracy. "The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). "[E]ducation . . . is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

One of the "values on which our society rests" is equal treatment of all people regardless of race, ethnicity, and national origin. Equal treatment is required not only of government in most instances, but also of citizens within the workplace. Justice O'Connor has stated, "the dream of a Nation of equal citizens," requires not only a government that does not make pernicious racial distinctions, but "a *society* where race is irrelevant to personal opportunity and achievement." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989) (emphasis added). The most important domain in which this goal of equal treatment must be realized in order to fulfill the promise of American life is the workplace. As President John F. Kennedy stated to Congress on introducing the Civil Right Act, "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has . . . no job." 109 CONG. REC. 11159 (1963).

The focus here is not remedial. The focus is not on "sins committed in the past," but rather, "we . . . ask whether the [University's] action advances the public interest in educating children for the future." *Wygant v. Board of Education*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting). The University appropriately sought to advance forward looking, educational objectives "of paramount importance in the fulfillment of its mission." *Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J.).

The University presented compelling evidence of the educational benefits of the diverse student body created by the challenged admissions policies. We trace in greater detail just one of these benefits—the reduction of prejudice and stereotypes that lead to discrimination—and we trace that benefit through the door of higher education into the workplace.



## I. THE COMPELLING INTEREST IN REDUCING EMPLOYMENT DISCRIMINATION

In 1964, the United States Congress declared employment discrimination based on race, color, and national origin unlawful. *See* 42 U.S.C. §§ 2000e-2000e-16. The national project embodied in Title VII of the 1964 Civil Rights Act is ongoing. We demonstrate below that as important to the success of this project as legal prohibition, lawsuits, damages or injunctions are the lessons learned through the interaction with diverse peers enabled by the admissions policies at issue.

### A. The Persistence of Employment Discrimination

Let us not forget that it was only forty years ago that employers openly discriminated on the basis of race. When the parents of the students on both sides of these cases were entering the workplace, many of its doors still bore signs reading for whites only. For example, the Washington Post of January 3, 1960, ran an ad for "NURSE (practical) white, for small nursing home, Silver Spring area." Darity & Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. OF ECON. PERSPECTIVES 63, 66 (1998). As recently as 1943, the American Bar Association did not admit African-Americans to membership. R. ABEL, AMERICAN LAWYERS 103 (1989). As Justice Brennan recognized in *Bakke*, "massive official and private resistance prevented . . . attainment of equal opportunity . . . in the professions." *Id.*, 438 U.S. at 371 (Brennan, J., concurring in part and dissenting in part).

Lamentably, employment discrimination is not a thing of the past. In 1995, the Federal Glass Ceiling Commission, a bipartisan commission created by Congress whose members were appointed by President George H.W. Bush, found, "Workplace discrimination presents a significant glass ceiling barrier for minorities." A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL-RECOMMENDATIONS OF THE FEDERAL GLASS

CEILING COMMISSION 15 (1995). "Many judgments on hiring and promotion are made on the basis of . . . the color of skin," the Commission's fact-finding report concluded. GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL-FACT-FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION (1995). In 1995, this Court recognized, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). In other words, "The problem that Congress addressed in 1964 remains with us." *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 n. 4 (1979).

Scholars have documented the stubborn persistence of employment discrimination with varying forms of measurement which we summarize in this subsection.

While the number of employment discrimination claims is only a rough proxy for the "unfortunate reality" of discrimination, it is significant that "the volume of federal employment discrimination litigation has grown spectacularly, many times faster than the overall federal civil caseload." Donohue & Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983-84 (1991). The number of employment discrimination claims filed in federal courts has increased from less than 350 per year in 1970 to approximately 9,000 in 1983. *Id.* at 985. The number of employment discrimination cases rose by 2,166% between 1970 and 1989 compared to a 125% increase in the entire civil docket. *Id.* The same upward trend is found at the Equal Employment Opportunity Commission. GLASS CEILING COMM., A SOLID INVESTMENT, at 39.[2]

[2] Surveys also reveal that many workers – whether or not they file a charge or lawsuit – believe they have been discriminated against. A survey conducted by the Center for Survey Research and Analysis at the University of Connecticut revealed that 28% of African Americans and 22% of Hispanics believe they had been treated unfairly at work because of their race. JOHN J. HELDRICH CENTER FOR WORKFORCE DEVELOPMENT, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 11 (2002).



Another indicator of persistent employment discrimination is the gap between the wages earned by African-American and White workers. A comprehensive review of the literature concludes, "Such differentials have been remarkably persistent and have actually increased in the last 15 years among blacks versus whites." Altonji & Blank, *Race and Gender in the Labor Market*, in 3 HANDBOOK OF LABOR ECONOMICS 3143, 3249 (Ashenfelter & Card, eds. 1999). The "Hispanic/white wage gap has [also] risen among both males and females in recent years." *Id.* at 3145. Black and Hispanic men earn about two-thirds of what White men earn on an hourly basis and Black and Hispanic women earn slightly over one-half what White women earn. *Id.* at 3146. These differentials exist across the employment spectrum. For example, African-American men with professional degrees earn 21% less than their White counterparts. GLASS CEILING COMM., GOOD FOR BUSINESS, at 9.

Annual earnings show an even larger differential "suggesting that weeks and hours worked are lower among minorities." Altonji & Blank, *Race and Gender*, at 3147. Black mean per capita income was just over 60% of the national average according to both the 1980 and 1990 census. Darity, Guilkey, & Winfrey, *Explaining Differences in Economic Performance Among Racial and Ethnic Groups in the USA: The Data Examined*, 55 AM. J. OF ECON. & SOC. 411, 414 (1996). According to the 1990 census, while 13% of the population lived below the poverty line, 30% of Black people lived in poverty. *Id.* at 413, 414. Indeed, the gap between Black and White unemployment grew between 1963

and 1989. Cotton, *Labor Markets and Racial Inequality*, in LABOR ECONOMICS: PROBLEMS IN ANALYZING LABOR MARKETS 183, 190-91 (Darity, ed. 1993). In 1990, the proportion of unemployed Black workers was 2.77 times that of White workers. *Id.* at 191. Hispanic workers are similarly more likely to be unemployed, controlling for relevant differences in personal and labor market characteristics. DeFreitas, *Ethnic Differentials in Unemployment among Hispanic Americans*, in HISPANICS IN THE U.S. ECONOMY 127, 154-56 (Borjas & Tienda, eds. 1985).

Minorities are scarce in high-paying jobs. In law practice, a 1989 survey of the nation's 250 largest firms found that 98% of partners were White, less than 1% Black, and less than ½% Hispanic. Jensen, *Minorities Didn't Share in Firm Growth,* NAT'L L.J., Feb. 19, 1999, at 1. At the top of the corporate ladder, 97% of senior managers at Fortune 1000 industrial and Fortune 500 service companies are White, .6% are African-American, .4% Hispanic. GLASS CEILING COMM., GOOD FOR BUSINESS, at 9. The 1990 census revealed that only 14% of Black men held professional or managerial jobs compared to 26% of all men. Darity, Guilkey, & Winfrey, *Explaining Differences*, at 413, 414-15.

Some of the racial gap in hourly and yearly earnings can be explained by differences in education, training, experience and other legitimate qualifications, but studies reveal that credentials explain less than half of the racial gap in male workers' earnings. Darity, Guilkey, & Winfrey, *Explaining Differences*, at 413, 419. Princeton economist Alan S. Blinder estimated that 40% of racial wage differences can be attributed to "outright discrimination in rates of pay" and another 30% to "discrimination in achieving the other endogenous variables (such as education, occupation)." Blinder, *Wage Discrimination: Reduced Form and Structural Estimates*, 8 J. OF HUMAN RESOURCES 436, 447 (1973). These studies conclude that the wage data from sources such as the official census provides "systematic evidence of



discriminatory differentials affecting the wages of . . . black, Native American, and . . . men of Hispanic origin." Darity, Guilkey, & Winfrey, *Explaining Differences*, at 420.

Although a few scholars ascribe differences in wages, income and job type that remain after controlling for objective qualifications to unmeasurable but relevant differences in "culture," there is "a growing body of evidence" to the contrary in studies that "use[] color or 'skin shade' as a natural experiment to detect discrimination." Darity & Mason, *Evidence on Discrimination*, at 71. "[T]hese studies . . . look at different skin shades within a particular ethnic group at a particular place and time" in order to "control for factors of culture and ethnicity other than pure skin color." *Id.* One such study found statistically significant differences in occupation and income among Blacks of different skin tones ranging from "very dark" to "very light" with personal incomes for "very light" 65% greater than for "very dark." Skin tone remained related to income "net of parental socioeconomic status, education, occupation, and [other] sociodemographic variables." Keith & Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. OF SOC. 760, 768-69, 772-73 (1991). This result is replicated in numerous, similar studies of African-Americans and Hispanics. *See* Darity & Mason, *Evidence on Discrimination*, at 71-72.

Indeed, when these studies are turned on their head, holding color constant and varying culture, by comparing black skinned people of differing ancestries, black skinned workers suffer the same consequences of their color regardless of culture. *See generally id.* at 83. Thus, Michigan State University Professor Stephen A. Woodbury found that while Blacks of West Indian origin earn more than other Blacks, largely because they have more relevant, positive characteristics, Blacks of West Indian descent also earn less than Whites and the gap cannot be explained based on similar differences in relevant characteristics. Woodbury, *Culture*

*and Human Capital: Theory and Evidence or Theory Versus Evidence* in LABOR ECONOMICS 239, 248. "These facts suggest," two scholars conclude, "that the effects of skin tone are not only historical curiosities from a legacy of slavery and racism, but present-day mechanisms that influence who gets what in America." Keith & Herring, *Skin Tone*, at 777.

Even more direct evidence of the stubborn persistence of employment discrimination is found in empirical research using testers. In the 1990s, the Urban Institute conducted a series of carefully controlled studies using matched pairs of applicants for entry-level positions, trained to minimize dissimilarity in the quality of their self-presentation, with resumes designed to give them equal credentials. *See* Darity & Mason, *Evidence on Discrimination*, at 78-79. The studies found that African-American males were three times as likely to be turned down for a job as White males, and Hispanic males were also three times as likely to be turned down as non-Hispanic White males. *Id.* at 79. Other studies have found that White testers are close to 10% more likely to receive interviews than African-Americans; once they are interviewed, half of the White testers are hired compared to only 11% of African-Americans; and among those hired, White testers are offered an average of 15 cents per hour more than African-Americans. *See id.* at 79 (*citing* Bendick & Jackson, *Measuring Discrimination Through Controlled Experiments*, 23 REV. OF BLACK POL. ECON. 25, 32 (1994)). A similar study conducted under contract with the General Accounting Office using Hispanic and Anglo testers found comparable evidence of discrimination. H. CROSS, G. KENNEY, J. MELL & W. ZIMMERMAN, EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS 3 (1990) (Anglos received 33% more interviews than Hispanics and 52% more job offers). Two scholars describe the significance of these rates of disparate treatment:



> A typical job seeker applies for a number of jobs in the course of one search for employment. If one job application in five is infected by discriminatory treatment, then the probability that a minority job seeker experiences discrimination during a multiple-application search approaches 100 percent. Such findings suggest that virtually every minority participant in the non-professional American labor market is likely to be touched by discrimination. [Bendick & Jackson, *Measuring Discrimination*, at 34.].[3]

The comprehensive survey presented in the Handbook of Labor Economics concludes, "The [tester] studies to date generally suggest that hiring discrimination continues to occur." Altonji & Blank, *Race and Gender*, at 3194.

The strong evidence of the persistence of employment discrimination provided by testing has recently been confirmed in a study using resumes which were randomly assigned African-American or White identified names. Bertrand & Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination*, unpublished manuscript, University of Chicago School of Business (2002) (*reported in* Krueger, *Sticks and Stones Can Break Bones, But the Wrong*

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[3] These studies also produce compelling anecdotal evidence of discrimination.

> The Washington Post carried an advertisement for a restaurant supervisor in the Washington suburbs. An African American tester who went to the restaurant was told that he would be called if the restaurant wished to pursue his application. Minutes later, a white tester with equivalent credentials followed the same procedure. He was called later the same day to schedule an interview, interviewed the day after that, and subsequently offered the position. Meanwhile, the African American tester made four follow-up calls to reiterate his interest in the position, including one after the white tester refused the job offer. No response was received to these calls. [*Id.* at 33.]

*Name Can Make a Job Hard to Find*, N.Y. TIMES, Dec. 12, 2002, at C2).[4] In this study, professors at the University of Chicago School of Business and Massachusetts Institute of Technology Department of Economics created a set of resumes using those posted on job search websites and divided them into high and low quality based on labor market experience, gaps in employment, and skills. *Id.* at 6. The names were taken from birth certificates with racially distinctive names being those having the highest ratio of frequency in one racial group compared to frequency in the other racial group (with distinctiveness verified through a survey). *Id.* at 7-8.

During 2001 and 2002, the scholars responded to over 1,300 help-wanted ads, sending almost 5,000 re. umes, in each case, two high-quality and two low-quality, one of each drawn at random to receive an African-American name and the other a White name. *Id.* at 9. The study found a differential call-back rate of 50% "that can solely be attributed to the name manipulation." *Id.* at 11. "[T]hese results imply that a White applicant should expect an average one call back for every 10 ads she or he applies to; on the other hand, a[n] African American applicant would need to apply to 15 different ads to achieve the same result." *Id.* The study also found that "African Americans experience much less of an increase in call-back rates [compared to Whites] for the same improvements in their credentials." *Id.* at 14-15. "[E]mployers simply seem to pay less attention or discount more the characteristics listed on the resumes with African American sounding names" so that "African Americans have

[4] The experiment was designed to eliminate three criticisms of testing research—that matched pairs of applicants can never be exactly identical, that testers know the purpose of the research which may generate conscious or unconscious motives to generate data consistent or inconsistent with a finding of discrimination, and that it is difficult to generate a large sample using testers. *Id.* at 5.



little to gain (in terms of reduced discrimination) from improving their credentials." *Id.* at 16, 25. The authors of the study conclude, "we find huge differences in call-back rates by race. . . . Since applicants' names are randomly assigned, this gap can only be attributed to the race-specific names, suggesting that employers discriminate (quite a bit) on the basis of race." *Id.* at 3. The inescapable conclusion is "that discrimination is an important factor in why African Americans do poorly in the labor market." *Id.* at 25.[5]

Moreover, once hired, numerous studies reveal that, "other things being equal, blacks are about twice as likely as whites to be laid off or fired." Zwerling & Silver, *Race and Job Dismissals in a Federal Bureaucracy*, 57 AM. SOC. REV. 651, 651 (1992). A study of the Postal Service conducted in the early 1990s by professors at Brown University and the University of Iowa found that, "regardless of length of employment, job category, or personal characteristics, blacks were still more than twice as likely as whites to be fired." *Id.* at 657. It concluded, "Clearly, racial differences in dismissals persist after controlling for human capital variables and job category." *Id.* at 658.

While employers seldom expressly acknowledge discrimination, surveys of employer and employee attitudes reveal the stereotypes and prejudices that underlie such unlawful practices. "Surveys consistently find an expressed preference for co-workers who are homogeneous by race." Moss & Tilly, *"Soft" Skills and Race: An Investigation of Black Men's Employment Problems*, Russell Sage Foundation Working Paper (1995). *See also* Kirschenman & Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race*

[5] Further evidence of discrimination in hiring is found in data revealing that both suburban employers and employers with more White customers hire a lower percentage of Black applicants. H. HOLZER. WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 94-103 (1996).

*for Employers*, in THE URBAN UNDERCLASS 203, 211 (Jencks & Peterson, eds. 1991). Harvard University Sociologist William Julius Wilson analyzed the results of a survey of a representative sample of employers providing entry-level jobs in his book WHEN WORK DISAPPEARS (1996). He found that a large majority of those who commented on inner-city workers' traits expressed views of Blacks that were coded as "negative." *Id.* at 112. A similar survey by two University of Chicago scholars found that 37.7% of employers ranked Blacks' work ethic last among racial and ethnic groups. Kirschenman & Neckerman, *We'd Love to Hire Them*, at 210. The views openly expressed by employers in these studies are highly revealing, but space allows just one example. A suburban drug store manager said:

> [I]n my business I think overall [black men] tend to be known to be dishonest. I think that's too bad but that's the image they have.
>
> . . . .
>
> . . . . They're known to be lazy. . . .
>
> (Interviewer: I see. How do you think that image was developed?)
>
> Go look in the jails [laughs]. [*Id.* at 221.]

Indeed, 13.4% of the employers in Wilson's survey actually acknowledged employment discrimination was a reason why inner-city black males cannot find jobs. WILSON, WHEN WORK DISAPPEARS, at 118.

A comprehensive survey of the empirical evidence by Professors William A. Darity Jr. of the University of North Carolina and Patrick L. Mason of Florida State University published in the Journal of Economic Perspectives in 1998 concluded, "The direct evidence . . . confirms the persistence of discriminatory practices in employment." Darity & Mason, *Evidence on Discrimination*, at 81. The result is that "Blacks, especially black men, continue to suffer significantly reduced



earnings due to discrimination and the extent of discrimination." *Id.* at 76.

### B. The Resistance of Discrimination Rooted in Prejudice and Stereotypes to Prohibition

The forms of employment discrimination these studies document have not been eliminated by legal prohibition and are not likely to be. While the primary aim of Title VII was to eliminate discrimination in hiring, research reveals that such discrimination persists and is the least susceptible to legal sanction. "The crux of the problem" addressed by Congress was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 CONG. REC. 6548 (1964) (Senator Humphrey). Yet the proportion of employment discrimination cases in federal court and charges filed with the EEOC challenging *hiring* discrimination has plummeted. Donohue & Siegelman, *Changing Nature*, at 984, 1015. One obvious reason for this shift in the focus of litigation is that absent express exclusionary policies, most applicants who are discriminated against in hiring never know it and thus do not experience the same sense of grievance as an employee who is discriminated against during employment or in termination even if the effects of discrimination in hiring are equally or even more pernicious. Two scholars observe, "If a job applicant is told that an advertised position has already been filled or that another applicant has been hired who is more qualified, the disappointed job seeker typically does not have sufficient information to confirm or contradict these assertions." Bendick & Jackson, *Measuring Discrimination*, at 26.

Two primary causes of employment discrimination, particularly in hiring, are stereotypes and prejudice arising out of the physical separation of people of differing races and ethnic groups that exists in our society. The Glass Ceiling Commission concluded, "Research consistently identifies

stereotypes, along with prejudice and bias, as a barrier to job advancement." GOOD FOR BUSINESS, at 71. Scholars who study employment discrimination conclude that "[e]mployers seem to possess strong racial . . . preferences in hiring. These preferences are the consequence of enduring stereotypical beliefs." Darity & Mason, *Evidence on Discrimination*, at 81. Two scholars of the labor market explain, hiring "[d]ecisions are often made on limited information—typically, a one-page resume and an interview averaging perhaps twenty minutes. It is therefore not surprising that interviewers' judgments of individuals are influenced by generalizations about the applicant's demographic group that the interviewer may have formed over a lifetime." Bendick & Jackson, *Measuring Discrimination*, at 41-42.[6]

This Court has recognized that enforcement alone will not eliminate employment discrimination, rather, Congress "intended" the "statutory words . . . as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" *Weber*, 443 U.S. at 204 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)). Indeed, at the very moment it passed the Civil Rights Act containing Title VII, Congress recognized, "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities." H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963), *reprinted in* 1963 U.S. CODE CONG. & ADMIN NEWS 2355, 2393.

[6] The role of prejudice and stereotype is confirmed by evidence that firms that rely on skills tests instead of subjective evaluation hire more African-American workers controlling for firm size, racial composition of surrounding area, and occupation. Neckerman & Kirschenman, *Hiring Strategies, Racial Bias, and Inner City Workers*, 38 SOC. PROBLEMS 433, 443 (1991).



Contact with diverse peers during higher education can induce precisely the form of "self-examin[ation]" this Court has identified as essential to the elimination of discrimination in employment, as we demonstrate in Section II.

## II. THE ADMISSIONS PROGRAMS FURTHER THE COMPELLING INTEREST IN REDUCING DISCRIMINATION

The University's compelling case establishing the educational benefits of a diverse student body rests on two foundations. First, the vast majority of Americans function in segregated settings until they reach college. Thus, higher education presents a unique opportunity and, from the vantage of the workplace, the last opportunity, to foster interaction between diverse individuals. Second, interaction with diverse individuals during higher education is likely to produce positive results due both to students' stage of intellectual, social, and moral development and to the unique environment on college campuses. Empirical research confirms the educational benefits of interaction with diverse peers during higher education.

### A. Segregation in the U.S. Prior to College

"[R]esidential segregation 'is a national . . . phenomenon," Justice Scalia recognized in *Freeman v. Pitts*. 503 U.S. 467, 502 (1992) (Scalia, J., concurring) (*quoting Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 223 (1973) (Powell, J., concurring in part and dissenting in part)). University of Pennsylvania Professor Thomas J. Sugrue detailed the staggering degree of residential segregation in his expert report and concluded, "Americans of different races and ethnicities . . . live in worlds that have a long history of separation and are still, to a great extent, separate." ERs 18.[7]

[7] The University's expert reports are collected in *The Compelling Need for Diversity in Higher Education* which is cited here as ERs.

Segregated housing patterns lead directly to segregation in schools. "The effect of changing residential patterns on the racial composition of schools, though not always fortunate, is somewhat predictable. Studies show a high correlation between residential segregation and school segregation." *Freeman*, 503 U.S. at 495. Again Professor Sugrue detailed the degree of school segregation and concluded, "American primary and secondary schools are seldom diverse." ERs 18.

Contemporary segregation in schools has been held largely to be beyond the reach of legal remedies. "Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. . . . Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies." *Freeman*, 503 U.S. at 495.

Surveying the extent of residential and primary and secondary school segregation, Professor Sugrue concluded, "There are unfortunately few places in American society where people of different backgrounds interact, learn from each other, and struggle to understand their differences and discover their commonality." ERs 49. The consequences are obvious:

> Residential and educational distance fosters misconceptions and mistrust. It affords little or no opportunity to disrupt the perpetuation of racial stereotypes that are a basis and justification for racial separation. The high degree of separation by race reinforces and hardens perceptions of racial difference. [ERs 18.]

In sum, this separation "is a seedbed for misinformation, hostility, and fear"—the roots of discrimination. ERs 19.



### B. The Conditions for Contact on Campus

University of Michigan Psychology Professor Patricia Gurin explained in her expert report the two reasons why higher education presents a "special opportunity" to disrupt the perpetuation of racial stereotypes. ERs 100. First:

> Students come to universities at a critical stage of their development, a time during which they define themselves in relation to others and experiment with different social roles before making permanent commitments to occupations, social groups, and intimate personal relationships. In addition, for many students college is the first sustained exposure to an environment other than their home communities. [ERs 100.]

Second, the environment on campuses contains elements long found to be critical to positive interaction among diverse individuals: "the presence of diverse others; equality among peers; and discussion under rules of civil discourse." ERs 107-08.

Together, Professors Sugrue and Gurin point out why higher education i government's last, best hope for preventing discrimination in the workplace.

### C. The Benefits of Contact With Diverse Peers in Higher Education

#### 1. *Reduction of Stereotypes and Bias*

Professor Gurin found, "The long-term pattern of racial separation noted by many social scientists can be broken by diversity experiences in higher education," thereby lessening stereotypes, prejudices and fears as well as the resulting discrimination such separation breeds. ERs 101. She documented a positive relationship between a diverse student body and students' racial attitudes persisting after graduation.

Professor Gurin's finding is not novel and does not rest on new theoretical foundations. Stated in most basic terms, the

theory is that contact between groups, under the correct conditions, reduces prejudice. This theory has been tested and validated in countless studies. For example, in what has been described as "the most extensive laboratory test of the intergroup contact hypothesis," researchers demonstrated "impressive change of potential practical significance." Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCH. 65, 79 (1998) (the cited study is discussed in Cook, *Cooperative Interaction in Multiethnic Contexts*, in GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 155, 156-60 (Miller & Brewer, eds. 1984)). A survey of the literature reports, "The idea that familiarity breeds positivity has usually been sustained . . . particularly when people interact under conditions of relative equality." Sigelman, Bledsoe, Welch, & Combs, *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1307 (1996). While the degree of positive effect varies across studies, two scholars found, "In some instances, the positive effects of interracial contact are modest, but even these modest effects, aggregated over millions of black and white Americans, have the potential to ease the prevailing climate of race relations. And in some instances, the positive effects of interracial contact are substantial." Sigelman & Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781, 793 (1993).

Just as the theoretical foundation of Professor Gurin's findings are not novel, neither are her empirical findings. The positive effects of increasing students' contact with diverse peers both on reducing fear and prejudice and, as a consequence, increasing the likelihood of living and working in integrated settings after graduation were extensively documented in the first decades of school desegregation and, in the past few years, in studies of diversity in higher education. Two scholars' recent survey of the research found, "The effects of contact on prejudice have been tested in a



variety of settings that include school and colleges . . . . [and p]revious research has generally concluded that equal status, non-competitive contact erodes stereotypes, and contributes to a moderation in racial prejudice." Wood & Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT. J. INTERCULTURAL REL. 1, 2 (1996).

Countless studies of primary and secondary schools confirm these findings. A review of the research by the Chair of the Sociology Department at Notre Dame University concluded, "This research is fairly consistent in reporting that black and white students in desegregated schools are less racially prejudiced than those in segregated schools" and "that interracial contact in desegregated schools leads to an increase in interracial sociability and friendship." Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 745 (1998). Moreover, the research finds that these positive effects continue into adulthood. "Findings show that . . . childhood interracial contact promotes real and lasting improvement in racial attitudes into adulthood, both through the disconfirmation of negative racial stereotypes and through a direct effect on prejudice itself." Wood & Sonleitner, *The Effect of Childhood Interracial Contact*, at 14-15.

These findings are also replicated in studies of higher education as well as primary and secondary schools. Using surveys conducted among almost 9,000 college students at over 100 institutions when they were freshman in 1991 and 1992 and again in 1996, Stanford University Professor of Education Anthony L. Antonio found that the type of contact increased by the challenged admissions policies—dining, studying, and socializing with someone from a different racial/ethnic group as well as having a roommate of a different racial/ethnic group—were all positively related to growth in "cultural knowledge/understanding" (including both knowledge of and "ability to get along with people of a

different race/culture"), especially among white students. Antonio, *Student Interaction Across Race and Outcomes in College*, Paper presented at the Ann. Conf. of the Am. Ed. Research Ass'n 7, 8, 18 (April 1998). A survey of students at over 300 colleges and universities conducted by the UCLA Higher Education Research Institute found a significant positive relationship between studying with someone from a different racial group or ethnic background and growth in "acceptance of people of different races/cultures." Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187, 192-93, 196-98 (Orfield, ed. 2001). A survey conducted by the Gallup Poll of students at Harvard and the University of Michigan Law Schools found both that the students reported more contact with people of different races and ethnicities in college and law school than while growing up or in high school and that the vast majority of students reported that the diversity of the student body had enhanced their ability to work effectively and get along with members of other races. Orfield & Whitla, *Diversity and Legal Education: Student Experience in Leading Law Schools*, in DIVERSITY CHALLENGED, at 143, 155-59.[8]

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[8] Recognizing that the educational benefits the University seeks to advance through the challenged admissions policies are dependent on contact between diverse students—contact in classrooms, in the cafeteria, in dorm rooms, and on playing fields—makes it clear why a critical mass of minority students is necessary. Professor Gurin's report explained why "[a]dequate representation" was necessary to produce the benefits of contact and to avoid negative effects associated with severe under-representation, linked the identified educational benefits specifically to the "interaction with diverse peers afforded by Michigan's degree of structural diversity," and compared long-term outcomes from institutions with different percentages of minority students. ERs 116-18, 153. The University's logic is consistent with findings from earlier studies of school desegregation which found that absent a critical mass of minority students such students would "protect themselves by attempting to isolate themselves from the larger group" and thus the conditions for "maximizing contact and friendship formation" would be lost. McConahay, *Reducing Racial Prejudice in Desegregated Schools*, in EFFECTIVE SCHOOL DESEGREGATION: QUANTITY, QUALITY, AND FEASIBILITY 35, 39-40 (Hawley, ed. 1981).



It is critical to understand that the benefits of a diverse student body do not rest on stereotypes or the assumption that all African-American, Hispanic, or Native American students think alike, or think differently than White students, because, as Justice O'Connor wrote in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), "the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior." *Id.* at 615 (O'Connor, J., dissenting). The fundamental lesson the University imparts through a diverse student body is not that people with different skin colors think differently, but precisely the opposite—that such stereotypes and the prejudice they lead to should be discarded based on meaningful engagement with individual students of different races and ethnic groups holding many different views and coming from many different backgrounds. As Justice Stevens explained in *Wygant*, "one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." 476 U.S. at 315 (Stevens, J., dissenting). Here, the lesson is taught not by teachers but by students, and it is well recognized that "the influence of peers may be as great or greater than that of faculty." E. PASCARELLA & P.

TERENZINI, HOW COLLEGE AFFECTS STUDENTS: FINDINGS AND INSIGHTS FROM TWENTY YEARS OF RESEARCH 313 (1991). Sustained, individual contact with diverse students during higher education provokes critical thinking and breaks down stereotypes precisely because it contradicts the "generalizations" criticized by Justice O'Connor which are formed during earlier, ordinarily segregated stages of life.

### 2. *Benefits in the Workplace*

The empirical research demonstrates not only that students carry the lessons learned from interaction with diverse peers into adulthood, it specifically demonstrates that they carry those lessons into the workplace.

Considering data from nearly 200 colleges and universities and their students four and nine years after entry, Professor Gurin found that attending an institution with a more diverse student body "resulted in more diverse . . . work associates nine years after college entry." ERs 115. Attending a college or university with a diverse student body "had dramatic long-term effects on the likelihood that white students . . . would . . . work in diverse settings after college." ERs 116. Here again, Professor Gurin's results are simply confirmation of previous, long-term studies.

Surveying the literature on school desegregation in 1989, two Johns Hopkins University scholars found that "both Blacks and Whites who attended desegregated schools were more likely to function in desegregated environments in later life." Braddock & McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. OF BLACK STUDIES 267, 269 (1989). Specifically, "Blacks who had White work associates . . were shown to be significantly less likely to have attended a minority (segregated) high school." *Id.* at 271. In other words,



"earlier desegregation experience[] . . . has an independent [positive] effect . . . on the racial composition of . . . coworker groups." *Id.* This is true "across gender groups and labor-market sectors." *Id.* at 274. In fact, experience in a desegregated school has an even more positive relationship on "desegregation in work environments" than experience in an integrated neighborhood. *Id.* at 286. This finding has been confirmed in two studies of data generated by multiple, massive, long-term national surveys published in the mid-1990s. These studies found that "school racial composition has a strong, statistically significant, and positive effect on the likelihood that Blacks will have White coworkers and that Whites will have Black coworkers." Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. OF NEGRO ED. 255, 256 (1997). "The . . . results are unequivocal: school desegregation experience is the major determinant of the likelihood that African Americans, Mexican Americans and Whites will work in firms with a higher percent white for African Americans and Mexican Americans and a higher percent non-white for Whites." Braddock, Dawkins & Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT. J. OF CONTEMP. SOC. 273, 280 (1994). This correlation is independent of residential segregation, occupation, age and other possible influences. *Id. See also* Dawkins & Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. OF NEGRO ED. 394, 402 (1994); Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 610 (Banks, ed. 1995) ("In the area of employment, there is . . . evidence that school desegregation breaks down intergroup barriers."); Sigelman, *et al.*, *Making Contact*, at 1323 ("as is

true for blacks, having attended an integrated school as a child increases whites' adult contact with blacks"); Crain, *School Integration and Occupational Achievement of Negroes*, 75 AM. J. OF SOC. 593, 597 (1970) ("convincing evidence . . . that Negro alumni of integrated schools are in 'integrated' jobs"); R. CRAIN & C. WEISMAN, DISCRIMINATION, PERSONALITY, AND ACHIEVEMENT: A SURVEY OF NORTHERN BLACKS 161-63 (1972) ("Alumni of integrated schools are more likely to move into occupations traditionally closed to blacks.")

While many factors contribute to this positive relationship between desegregated education and integrated work lives, it is clear that one important causal factor is the lessening of negative racial stereotypes among both African-American and White students. National surveys show that breaking the pattern of racial segregation in schools lessens "social-psychological barriers" to later interracial contact. Braddock & McPartland, *Social Psychological Processes*, at 285. In plain terms, "cross-race contacts in desegregated schools reduce White students' negative racial stereotypes and fears of hostile reactions in interracial situations, [making] these White students as adults . . . less resistant to Blacks being admitted into coworker . . . groups." *Id.* "Whites in desegregated schools frequently show a decrease in their often initially high levels of fear and avoidance of African Americans, and an increasing willingness and ability to work with them." Schofield, *Review of Research*, at 610. On the other side of the racial divide, Blacks who attended segregated schools perceive co-workers in majority white workplaces as less friendly than coworkers in majority black workplaces and rate the competence of white supervisors substantially lower than black supervisors while these differences are either insignificant or substantially smaller for Blacks who attended desegregated schools. Braddock & McPartland, *More Evidence on Social-Psychological Processes that Perpetuate Minority Segregation: The*



*Relationship of School Desegregation and Employment Segregation,* Report No. 338 19-20, Center for Social Org. of Schools, Johns Hopkins Univ. (1983). An examination of data from a national, longitudinal survey found that "black, Latin, and white graduates of segregated schools perceive racially-mixed work groups as less friendly than racially-homogeneous ones. . . . Respondents from desegregated schools make . . . much less of a distinction." Schofield, *Review of Research*, at 610.[9] Other scholars have confirmed, through data drawn from similar, national surveys, that "attending desegregated schools improves the attitudes of both blacks and whites toward future interracial situations." Braddock, Crain, & McPartland, *A Long-Term View*, at 262. Indeed, this finding has been replicated for Whites, Blacks and Hispanics. Dawkins & Braddock, *The Continuing Significance of Desegregation*, at 402; Wells & Crain, *Perpetuation Theory and the Long Term Effects of School Desegregation*, 64 REV. OF ED. RESEARCH 531, 551 (1994).[10]

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[9] These studies show not only that Black students who attended segregated schools are more likely to be averse to working in an integrated setting, but that they are also are more likely to *believe* they are being discriminated against both in college and in employment settings than Black students who attended desegregated schools. Braddock, Crain, & McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259, 262 (Dec. 1984).

[10] The interactions produced by the admissions programs at issue will have a positive impact not only on attitudes that will be carried into the workplace, but on social networks that will also play a role in determining what workplace students enter. Most employers rely on inexpensive and informal hiring procedures such as referrals from current employees. Braddock & McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. OF SOC. ISSUES 5, 7-8 (1987). Because of continued segregation in housing and schools, "black job seekers are primarily tied to social networks composed of other blacks who, on the

After reviewing the research on school desegregation, racial attitudes, and employment, one scholar concluded, "The claims of formal contact theory may be too modest with respect to school desegregation. . . . [T]he positive effects of school desegregation appear to be far reaching, and include lifelong social integration and occupational attainment." Braddock, *School Desegregation and Black Assimilation*, 41 J. OF SOC. ISSUES 9, 17 (1985). Three of the principle scholars involved in this research for the past 30 years, conclude, "we now have considerable evidence that school desegregation is a necessary step to insure equality of economic opportunity to minorities in U.S. society." Braddock, Crain, & McPartland, *A Long-term View*, at 264.

In sum, the evidence presented by the University; basic experimental research on social contact; long-term, nation-wide studies of school integration; and studies of diversity in higher education all confirm that the interaction of diverse students during higher education reduces stereotypes and prejudices and thus allows these students to enter the workplace significantly more likely to comply with the command that they not discriminate on the basis of race, color or national origin.

## III. THE ADMISSIONS PROGRAMS ARE NARROWLY TAILORED

The University and other *amici* will demonstrate that the admissions policies "are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. We write separately only to address the existence of race-neutral alternatives.

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average, are not as well situated to know about many desirable job openings." *Id.* at 8 This results in what has been called "social network segregation." *Id.* Successful school desegregation disrupts this process and leads to significantly more African-American students entering integrated workplaces. *Id.* at 9.



### A. There Are No Race-Neutral Alternatives

An explicit objective of the admissions policies at issue is to obtain a student body that is racially and ethnically diverse as well as diverse along other dimensions. The educational benefits of the policies discussed above, most obviously, reducing prejudice and increasing tolerance, cannot be obtained unless this race-conscious objective is achieved. The United States argues that "diversity" can be attained through "race-neutral" means such as the percentage plans adopted in California, Texas and Florida. *Grutter*, Brief of the U.S. at 8.[11] But this equivocal position is analytically flawed.

If the University were to rely on the degree of residential and school segregation described above by attempting to achieve its race-conscious objective through facially race-neutral means, such as admitting the top 10% of students from all public high schools, its action would not be "a race-neutral alternative[]" under the Constitution as the United States suggests. Rather, the action would be the mirror image of the anti-busing initiative held unconstitutional by this Court in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). That initiative "nowhere mention[ed] 'race' or 'integration,'" yet this Court held that "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes." *Id.* at 471. Because of the existence of residential and consequent school segregation, Washington voters were able to use facially race-neutral means—limitations on busing—to achieve a race-conscious objective—the perpetuation of segregation. Similarly, the United States proposes that the University could rely on the same residential and consequent school segregation to achieve a race-conscious goal—a diverse student body—through facially race-neutral means—such as

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[11] Obviously, this argument has no application to the Law School.

a 10% plan. In *Seattle School Dist.*, this Court held that the facially-neutral initiative was "inherently suspect." *Id.* at 485. For the same reasons, the United States has not proposed any truly race-neutral means of achieving the University's legitimate race-conscious objectives.

Thus, the United States advances not a race-neutral alternative but a disingenuous one. The United States posits that "[m]easures that ensure diversity . . . are important components of government's responsibility to its citizens." *Grutter*, Brief of the U.S. at 8. But if "ensur[ing] diversity" means what it must mean in order to achieve the objectives sought here, i.e. ensuring racial and ethnic diversity, then the "[m]easures" endorsed by the United States are not race-neutral. As Justice O'Connor wrote in *J.A. Croson*, "'[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment . . . , it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate.'" 488 U.S. at 505 (*quoting Fullilove v. Klutznik*, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting)). In this case, the University has "clearly identified" the reasons for its race-conscious policies. These reasons are "unquestionably legitimate." The policies are surely not rendered unconstitutional because the same race-conscious objectives can be pursued in a less forthright manner, as the United States suggests.[12]

## CONCLUSION

For the above-stated reasons, this Court should hold that the challenged admissions policies are constitutional.

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[12]The University and other *amici* will demonstrate that the "race-neutral" alternatives pointed to by the United States cannot, in fact, achieve the objectives sought here.

Respectfully submitted,

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